

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of the Northeast San Jose Transmission Project.

Application 99-09-029

**OPINION CONFIRMING ASSIGNED COMMISSIONER'S RULING
DENYING MOTION OF CALPINE c*POWER****Summary**

The motion of Calpine c*Power (Calpine) to compel Pacific Gas and Electric Company (PG&E) to comply, at this time, with Pub. Util. Code § 625(a)(1)(B)¹ is denied. However, PG&E must provide notice pursuant to § 625 (a)(1)(B) if and when it pursues installation of facilities for the purposes of providing competitive services.

Background

In Decision (D.) 01-05-059, the Commission granted PG&E's application for a certificate of public convenience and necessity (CPCN) to build a new 7.3 mile 230 kilovolt (kV) double-circuit transmission line, upgrade certain other transmission facilities, and construct a transmission/distribution substation to

¹ All statutory references are to the Public Utilities Code, unless otherwise noted.

serve the Northeast San Jose area. The Commission found that PG&E had demonstrated the need for the project to maintain the reliability of its electric system.

The Commission chose the environmentally superior route for the project, as set forth in the Final Environmental Impact Report (FEIR). The decision adopted PG&E's proposed substation location at 1515 Alviso-Milpitas Road² and rejected the alternate – and adjacent – location proposed by the intervenor US Dataport, Inc. Finally, PG&E was directed to prepare updated, and detailed, cost estimates for the route and substation location selected.

PG&E submitted its updated cost information on June 18, 2001. The new cost estimate exceeded by more than \$100 million the original estimate PG&E furnished for the project. D.01-05-059 was thereafter stayed and further hearings were ordered on cost. On December 11, 2001, the Commission approved the project and established the project's cost cap at \$147,542,555. (D.01-12-017)

On March 25, 2002, Calpine filed a motion to compel PG&E to comply with § 625. In that motion, Calpine states that on or about March 1, 2002, PG&E filed an action to condemn the property and an *ex parte* application for prejudgment possession. The superior court issued an order granting possession of the property to PG&E.

Calpine contends that PG&E must obtain Commission authority under § 625 before it can continue with its eminent domain proceed to acquire property for its Los Esteros substation. Calpine further states that until PG&E requests

² The subject property is owned by North San Jose Energy Center, LLC, an affiliate of the movant Calpine.

such permission, and the Commission, pursuant to § 625, has made the requisite findings, PG&E has no lawful authority to commence or to maintain an action to acquire any of Calpine's property through condemnation. Calpine therefore requests an order compelling PG&E to comply with the requirements of § 625. Alternatively, Calpine requests that the Commission order a hearing to determine whether the proposed condemnation is subject to § 625 requirements.

Calpine's March 25 motion contends that there is a "high likelihood" that the property will be used, in part, for competitive telecommunications services. Calpine states that the transmission lines leading to and facilities to be located on the substation "could" carry and "likely" will include telecommunications facilities which PG&E itself will offer to be used on a competitive basis. In support, Calpine cites PG&E's increased project cost estimates for fiber optic facilities. Calpine adds that PG&E has engaged in other fiber optic leases using similar facilities.

On March 27, 2002, PG&E filed an opposition to Calpine's motion, in which PG&E maintains that § 625 is inapplicable because the property is not being acquired to provide competitive service. PG&E argues that § 625 does not apply unless and until it seeks to install facilities for competitive purposes. PG&E also argues that Calpine waived any right to raise a § 625 claim by not earlier making the claim. On April 2, 2002, Calpine filed a reply,³ stating, among other things, that its actions cannot deprive the Commission of subject matter jurisdiction to determine the applicability of § 625.

³ Administrative Law Judge (ALJ) Thomas granted Calpine leave to file a reply.

Discussion

Section 625 provides that a public utility that offers competitive services may not condemn any property for the purpose of competing with another entity unless the Commission finds that such an action would serve the public interest based on a hearing for which the owner of the property to be condemned has been noticed and the public has the opportunity to participate. (§ 625(a)(1)(A).) However, an exception is made for condemnation actions that are necessary solely for an electric or gas company to meet a commission-ordered obligation to serve. (§ 625(a)(1)(B).)

The Commission's rationale in the Tri-Valley decision (D.01-10-029) provides useful guidance for an analysis of § 625 applicability in this case. This question turns on whether the installation of facilities by PG&E includes the provision of competitive services. Therefore, the issue before the Commission is whether PG&E intends to provide a competitive service when it exercises its eminent domain authority to construct a Commission-ordered obligation, and if so, what type of notice must be given.

Section 625 provides an exception to its requirements only for condemnation actions that are "solely" for an electric or gas company to meet a Commission-ordered obligation to serve. The legislature deliberately used the word "solely." This is true because Commission-ordered obligations to serve were to be the only exception to § 625 since it was enacted to prevent public utilities from abusing the power of eminent domain. Policy and Fiscal Impact Report: Hearing on SB 177 Before the Pub. Util. Comm'n (CA. 1999) (statement by Senator Peace). The legislature did not want to give the electric and gas corporations a complete exemption from § 625 because electric and gas corporations can use their rights of way to construct telecommunications

networks and provide competitive services. Assembly Comm. on Utilities and Commerce: Hearing on SB 177 Before the Senate Comm (CA. 1999) (statement by Roderick Wright, Chair).

PG&E maintains that it has no current intent to lease the fiber optic cables for telecommunication purposes, thus it argues that § 625 is inapplicable. However, § 625(a)(1)(B) states that the electric or gas company shall provide notice if they intend to install telecommunication equipment on property for the purpose of providing competitive telecommunications services when land is acquired through eminent domain solely to meet its Commission-ordered obligation. Section 625 is silent with regard to subsequent use of facilities for competitive services after the utility meets its Commission-ordered obligation. The statute focuses on what the gas or electric company intends to do, and PG&E currently states that it has no intention to install excess fiber optic cables to provide competitive services. Because PG&E states it has no current intention to provide a competitive service, we agree that § 625 would be inapplicable.

On the other hand, not subjecting a public utility to the requirements of § 625 if that utility installs excess capacity when carrying out a Commission-ordered obligation, allows § 625 to be circumvented. The electric or gas company would need only state it had no intention of leasing its facilities but could sign subsequent contracts with competitive carriers. Section 625(a)(1)(B), which requires the gas or electric company to give notice to the Commission when installing equipment for the purpose of providing competitive services would then be avoided.

Although PG&E argues it has no intent to install additional telecommunications facilities as part of its proposed project, we will look to PG&E's past practices to establish whether the company intends to provide

competitive services through the excess capacity designed as part of the project, as we did in the Tri-Valley decision. We have previously noted that it has become a common practice for PG&E to lease out the excess capacity and it is also not economically sensible for PG&E not to utilize the excess capacity. If § 625 were inapplicable in all respects, gas and electric companies would be gaining a competitive as well as an economic advantage over new entrants into the market place desiring to construct a telecommunications network.

Accordingly, we conclude that PG&E's past practice indicates that the potential exists that it may lease out excess capacity for competitive purposes. Section 625 is therefore, applicable to an electric transmission project that is designed to serve an electric demand, but could carry a competitive fiber/telecommunications component.

Section 625 provides for two different levels of notice and oversight. The more difficult and time consuming standard requires that a public utility that offers competitive services may not condemn any property for the purpose of competing with another entity unless the Commission finds that such an action would serve the public interest based on a hearing for which the owner of the property to be condemned has been noticed and the public has the opportunity to participate. (§ 625(a)(1)(A)). The lesser standard requires that when condemning properties to carry out a Commission-ordered obligation, § 625 (a)(1)(B) is applicable, which only requires that notice be provided in the Commission's Daily Calendar. Congruent with our Tri-Valley decision, we conclude that the lesser standard, notice, applies here.

Comments on Draft Decision

Pursuant to Pub. Util. Code § 311(g)(3), and Rule 77.7(f)(9), we reduce the 30-day period for comments on the draft decision due to public necessity. Here

the public necessity provision is implicated by the need to complete the Northeast San Jose (NESJ) Project. The NESJ Project is designed to solve critical transmission deficiencies in the Greater San Jose area. The California Independent System Operator (“ISO”) has concluded that the transmission system in the Northeast San Jose area was in violation of the ISO grid planning criteria for reliability in the summers of 2000 and 2001. To support expected load growth and correct violations of the ISO reliability criteria, the ISO found, and the Commission agreed, that the NESJ Project should be operational by Summer 2003.⁴

Comments shall be filed and served on the e-mail service list for this proceeding no later than April 19, 2002. No reply comments will be accepted. Parties shall ensure that the assigned Commissioner and ALJ shall also receive the comments in hard copy and by electronic mail.

Findings of Fact

1. The Commission ordered PG&E to build and upgrade certain facilities to serve the Northeast San Jose area. (D.01-05-059)
2. The Commission adopted PG&E’s proposed substation location at 1515 Alviso-Milpitas Road. (D.01-05-059)
3. At this time, PG&E has no intention of providing competitive telecommunications services on the condemned property.

Conclusions of Law

1. Section 625 of the Public Utilities Code is applicable.

⁴ D.01-05-059 at 19-20, 84 (Finding of Fact No. 5); D.01-12-017 at 3-8, 28 (Finding of Fact No. 1).

2. Pursuant to Section 625(a)(1)(A), a party may not condemn any property for the purpose of competing with another entity in the offering of those competitive services.

3. A party is exempt from Section 625(a)(1)(A) if it is condemning property solely to meet its commission-ordered obligation to serve.

4. Pursuant to Section 625(a)(1)(B), if property is acquired through condemnation solely to meet a Commission-ordered obligation to serve and the condemning party then decides to install telecommunication equipment on the property for the purpose of providing competitive telecommunications services, said party shall provide notice for the planned installation in the Commission's Daily Calendar.

5. It is reasonable to reduce the comment and review period pursuant to Rule 77.7(f)(9) in order to allow this project to proceed expeditiously.

O R D E R

IT IS ORDERED that:

1. The motion of Calpine c*Power to compel Pacific Gas and Electric Company (PG&E) to comply with Pub. Util. Code § 625 (a)(1)(B) is denied.

2. PG&E must provide notice pursuant to § 625 (a)(1)(B) if and when it pursues installation of facilities for the purposes of providing competitive services.

This order is effective today.

Dated _____, at San Francisco, California.